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Without exception the members of the LAW REVIEW Staff for last year volunteered their services for military work, and it is only those few who were not accepted that have returned to School.

Under these circumstances the LAW REVIEW faced the decision of sacrificing quantity or quality. It chose to follow its traditions, and accordingly the size of the Editorial Staff has been materially reduced.

In order to maintain the high standard of our editorial work set in the past we may be forced to reduce the number of recent cases and notes, but in no way will the calibre of the work be affected. We have been successful in securing some very exceptional articles by eminent foreigners and Americans on Constitutional, Administrative, and International Law, and it is the intention of the REVIEW to devote a large proportion of its pages to the treatment of Public Law.

In the troublesome times that are ahead of us we shall rely, to a greater extent than ever before, on the continued loyalty of our contributors and subscribers. The first issue of the REVIEW containing the comments on recent cases and the editorial notes will appear on December first.

A NOTE ON M. DUGUIT. — We seem on the threshold of a new epoch in the history of the state. The movement towards what is vaguely called the socialization of law is in fact symptomatic of a far wider and deeper political synthesis. Distinguished thinkers all over the world do not hesitate to examine with scant respect the traditional institutions of modern government. Psychologists like Mr. Graham Wallas, soci-

ologists like M. Emile Durkheim,[1] political theorists like Mr. Ernest Barker,[2] are all of them insistent that the traditional defense of parliamentary government has broken down. The great society has outgrown the mould to which the nineteenth century would have fashioned it. The life of the community can no longer be contained in, or satisfied with, its political achievement. It is not so much the general content of our ideals that has been called into question. Rather has a grave doubt been raised whether the present mechanism of politics is likely to take us much further in the direction of their attainment.

It was inevitable that this scepticism should, sooner or later, penetrate the sphere of jurisprudence; and since it was, above all, the effort of Revolutionary France which outlined the character of the modern state, it was in some sort fitting that in France again the attempt to undermine its foundations should have been begun. The revolt against *étatisme* seems, in broad perspective, to have arisen about the time of the Dreyfus case. The republic did not emerge unscathed from that tremendous ordeal.[3] It had to turn its hand to the overwhelming labors involved in the Law of Associations on the one hand, and the separation of Church and State on the other. But, even then, its difficulties had hardly begun. The general democratic movement had left untouched the French civil service. Its hierarchical organization was inherited directly from the *ancien régime;* and Napoleon did no more than make it efficient. The result was to leave the *fonctionnaire* at the mercy directly of the minister, and, indirectly, of the deputy who had favors to bestow and candidates for their reception.[4] The law of associations, passed under the aegis of M. Waldeck-Rousseau, strengthened a movement towards trade unionism in the Civil Service which, though earlier in origin, did not become effective until the protection therein offered by the law opened up a profitable avenue of effort. The outstanding event in the ten years between the Separation and the War has been the challenge issued to the sovereignty of the state by its own servants. They claimed the right to protect themselves against its arbitrary acts. They demanded the right to maintain their professional interests and standards exactly as workers in an ordinary trade. If they did not obtain all they desired they received, at any rate, immense concessions. They revealed the immense growth of what M. Paul-Boncour has happily called economic federalism — the desire of each industrial and professional group to render itself an autonomous unit. It was a movement which essentially implied political decentralization. The effort of the state might be unified, but its methods of attainment could be various. And it became more than doubtful whether, in the new synthesis such decentralization involved, the sovereign state of the nineteenth century would not, in fact, be superfluous.

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[1] *Cf.* especially his *Division du Travail Social* (1893) and the numerous articles in the *Année Sociologique.*

[2] *Cf.* his important paper on the Discredited State in the *Political Quarterly* for February, 1915.

[3] On its general significance see M. Daniel Halévy's fine essay, *Apologie pour notre passee.*

[4] On the *fonctionnairiste* movement *cf.* the excellent book of P. Harmignie, *L'Etat et Ses Agents* (1911).

Hardly less significant was the development of French syndicalism.[5] The workers deserted the ideal of Marx, whose purpose was the capture of the bourgeois state, and went back to the theories of Proudhon, who denied altogether its validity. It is probable that we have here been greatly misled by the attractive glamour which attaches to the work of Sorel and Berth.[6] The real syndicalist movement is to be found in the workshops themselves, and in the effort of men like Pelloutier and Griffuelhes to develop a complete economic and social life for the worker outside the state. Political action has not been so much despised as ignored. The French Chamber has been regarded as simply irrelevant. Whatever its pretensions, the revolutionary state has been dismissed as an institution doing for the middle class what feudalism achieved for a landholding aristocracy. Its sovereign powers have been simply the most effective weapon by which it has served its purposes.

In some such atmosphere as this M. Duguit has written. His first volume dates from the second year of the twentieth century. It is already a mature outline of his present attitude, the experience gained in his twenty-five years of teaching as a Professor of Law in the University of Bordeaux. It is almost a prophetic analysis of the tendencies whose effects we have been witnessing. It is in no way an exaggeration of its significance to suggest that no work in the public law of our time has excited so eager a comment. It has divided the lawyers whose work verges on political speculation into fiercely hostile camps. Some, like M. Esmein,[7] fiercely deny its truth either as statement or induction, and urge that it would result in anarchy. They reproach M. Duguit for being in jurisprudence very much what M. Georges Sorel has been in economics — the dangerous apostle of revolutionary change. Others, like M. Berthelémy,[8] perhaps the ablest French authority today on administrative law, have not hesitated to adopt alike its methods and its conclusions. Others again, like M. Hauriou,[9] one of the most suggestive legal thinkers France has produced in the last generation, seem to reach not very different results by very different methods. A whole school of the more brilliant younger jurists, M. Maxime Leroy,[10] M. Georges Cahen,[11] M. Paul-Boncour,[12] are clearly influenced at every stage of their work by M. Duguit's speculations. In England and America its influence is already being felt; and it seems likely enough that the translations of his work which have been, and are to be, published,[13] will have an effect on this generation not very different from the influence exerted by Gierke since Maitland affixed his classic introduction to the famous translation of the *Genossenschaftsrecht.*

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[5] *Cf.* L. Levine. *The Syndicalist Movement in France* — an admirable book.

[6] Especially of the latter's *Réfléxions sur La Violence* (W. Huebsch, 1914), which, for all its brilliance, combines much bad history with much worse metaphysics.

[7] *Cf.* notably the fifth edition of his *Éléments du Droit Constitutionnel.*

[8] *Cf.* his *Traité de Droit Administratif* (7th ed.) and his paper in the *Revue de Droit Public* for 1915.

[9] *Cf.* his *Principes de Droit Public* (1916), especially the appendix on M. Duguit.

[10] *Cf.* his *Transformation de la Puissance Publique* (1907), and later works.

[11] *Cf.* his able study, *Les Fonctionnaires.*

[12] *Cf.* his *Syndicats des Fonctionnaires* (1906).

[13] Dean Wigmore has published, in the Legal Philosophy series, a translation of part of M. Duguit's *L'Etat: Le Gouvernement et ses Agents;* but the book loses much

The traditional theory of the state made of it the effective guardian of public order, and gave to it the weapon of sovereignty that it might achieve its purposes. By sovereignty was largely meant the right to act without being called to answer for such acts as it might consider essential to its aims. It was regarded as a person; with the significant limitation that the possession of its rights did not involve, save as an act of grace upon its own part, the assumption of kindred responsibilities.[14] In England, for example, the Crown cannot be sued save by permission of the Attorney-General. All sorts of limitations surround the effort to sue the American state, though certain constitutional guarantees — and very notably the Fourteenth Amendment — have been intended to limit state-omnicompetence. In France and in Germany the performance of public functions acted as a release from ordinary legal responsibility. The divine right of the monarch seemed, by the convenient fiction of national sovereignty, to be transformed into what, if not by definition then certainly in result, is the divine right of the state.

It is against such an attitude that M. Duguit's work has been a magistral protest. His earliest work [15] (1901–03) remains its fullest exposition. In a treatise on constitutional law (1907–11) which, in the breadth of its analysis challenges comparison with Esmein's almost incomparable study, he has traced its ramifications throughout the field best fitted to display its import. In three lectures at the *École des Hautes Études Sociales* (1908) he has effectively summarized his ideas in their general bearing. The *Transformations du Droit Public* (1913) relates them to the whole course of recent jurisprudence. Their main result is stated in the contribution he has made to the present number of this Review.

Roughly speaking, M. Duguit denies at once the personality and sovereignty of the state. He denies the personality of the state on the ground that it is a clumsy fiction. The only realities are human beings; and to attribute their personality to what is a mere bracket connecting the collective action of some few of their number seems to him an antiquated anthropomorphism that imperils the scientific basis of law. He denies the sovereignty of the state because it seems to him to imply the existence of rights where he sees only the existence of duties. Starting from the obvious fact of social interdependence, he insists that the only justifiable legal theory of the state is one that should enable it to satisfy the clear necessities of the time. But since that accomplishment depends upon the effort of each one of us, all that we possess is not the right to obtain the satisfaction of our individual wills, but the duty to contribute our energetic co-operation to the satisfaction of the social need. For M. Duguit, the state is no more than a group of men between whom, through a variety of historical circumstances, a differentiation

by this partial reproduction and the translation is very clumsy. Mr. B. W. Huebsch will publish a translation of the *Transformations du Droit Public* early in 1918.

[14] *Cf.* my *Problem of Sovereignty* (1917), Chap. I.

[15] M. Duguit had, indeed, published an early study on the separation of powers and the constituent assembly.

[16] The translation to be published by Mr. Huebsch will contain a bibliography of all M. Duguit's works.

between rulers and subjects has been introduced. It is not, in his view, an adequate defense of sovereignty as exercised by the rulers, to discuss its origins; the only justification of any policy is the contribution it makes to the social need. Upon each one of us, therefore, is cast the duty of narrowly scrutinizing the action of public authority to see if it fulfills this objective test. If it does not, it cannot, for us, have any legal validity whatever.

Very clearly, such a system of public law is different in character from the traditional notions of Anglo-Saxon civilization. This is not the place to raise the immense difficulties that it involves — difficulties, let it be said at once, that M. Duguit has honestly admitted, and as honestly attempted to answer. It might be said that unless there is in each state some unchallengeable source of authority, there is not, as M. Esmein has argued, any real guarantee of public order. It is possible to argue that M. Duguit has not, as he assumes, suppressed in his system the idea of subjective law; for each individual's notion of what does contribute to the social need will so differ as merely to transfer the subjectivity involved from the order issued by the ruling officials, to the judgment upon the validity of that order by the subjects who receive it. The hypothesis that each of us must, as a duty, contribute our utmost to the public good, involves the necessity of such a social organization as permits the full development of our capacity for that purpose; and this, of course, involves the condemnation of much of the present social order. But it is clear that if this has bowed out rights at the front door, it has, in fact, admitted them again at the back; for if our virtue is to be what T. H. Green finely called our positive contribution to social good, obviously we have the right to demand that nothing shall hinder the performance of our services. These are, of course, the fundamental problems of the modern state. In one way and another they are being raised in every shape on every side of us. M. Duguit would certainly not claim that he has made any final answer to them. But he has obviously restated them in such a form as to set them in a new perspective.

It is perhaps worth while indicating some of the possibilities that are involved in this outlook. The state is reduced to the position of a private citizen, since, like himself, it is brought within the scope of the objective law. That reduction necessarily involves the notion of its full responsibility for its acts, and M. Duguit has been quick to point out how the recent jurisprudence of the Conseil d'État in France is extending on every hand the idea of state-responsibility. It is, moreover, a doctrine that makes against authoritarianism. The only justification of any command is that its result in social good should be commensurate with the force that is involved in its exercise; but that is a matter for the judgment of each one of us. A real impetus is thus given to the initiative of the private citizen, and room is left for that reservoir of individualism upon which, in the last resort, the welfare of the state depends. As a consequence, there is more and more justification for territorial decentralization on the one hand, and administrative and professional federalism on the other. M. Duguit has pointed out how the excessive centralization of France makes for administrative inefficiency. Power should go where there is the capacity for its wise exercise, and there is not the least doubt in the world that, in this respect, at least, we have

much to learn from German experiments in municipal autonomy.[17] The organization of the civil services in France looks to a decentralization by professions, and here, too, M. Duguit has shown himself true to the sympathy his logic demands. It is perhaps right to note that his attitude to strikes in public utilities follows, almost exactly, alike in principle and in detail, the general theorem laid down by the majority of the Supreme Court in its recent decision on the Adamson Law.[18]

Lastly, it may be useful to point out the intellectual affiliations of M. Duguit in England and America. In England, for the most part, those ideas which approximate to his own have not come from the lawyers. The course of legislation, indeed, has for the past ten years been in a significantly collectivist direction; and Professor Dicey has noted in the concurrent revival of the idea of natural law a phenomenon of which the results are not very distinct from those to which M. Duguit looks forward.[19] From this standpoint the direction of labor policy has been particularly important; and especially in its latest phase of what is called guild socialism, it shows in a very noteworthy fashion points of important contact with his theories.[20] His criticisms of parliamentary government have been independently worked out by Mr. Graham Wallas in two books that are already classic; [21] and if Mr. Wallas has been less constructive than critical, where he has dealt with the problems of organization, it has been obvious that the synthesis he envisages would meet with M. Duguit's approval. On the theory of sovereignty itself, the starting point of all recent inquiry has been Maitland's classic analysis of corporate personality. Here, indeed, his conclusions have been antithetic to those of M. Duguit; but since Maitland denied the pre-eminence of the state-corporation over all others, the Austinian idol disappeared from his system. Dr. Figgis, in three admirable books,[22] has done much to dissipate the notion of an omnicompetent state; and no one has done more than he implicitly to answer the adverse criticisms of Professor Dicey upon the federal idea. The whole tendency in England, indeed, has been to place a decreasing confidence in any final benefit from state action. The social problems it has attempted to solve have grown beyond the methods historically associated with its functioning, and the time is ripe for new discovery.

America is fortunately situated in this respect. The classic home of federalism, nowhere is there ground more fertile for such seed as M. Duguit has sown. It is, indeed, true that recent constitutional practice in America has been towards a centralization based largely on *raison d'état*,[23] but that seems but a temporary synthesis. A significant and

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[17] *Cf.* my *Problem of Sovereignty*, Appendix B.

[18] *Cf.* his *Droit Social, Droit Individuel*, p. 137 f., with the Adamson opinion (advance sheets), pp. 8–9.

[19] *Cf.* Dicey, *Law of the Constitution* (8th ed.), p. xxxviii.

[20] Guild Socialism can best be studied in the volume (1914) called *National Guilds*, edited by Mr. A. R. Orage. A curious little volume by de Maeztu attempts to give it a juristic basis in M. Duguit's ideas.

[21] *Human Nature in Politics* (1908); *The Great Society* (1914).

[22] *The Divine Right of Kings* (2d ed., 1914); *Churches in the Modern State* (1913); *From Gerson to Grotius* (2d ed., 1916).

[23] *Cf.* my note in the *New Republic*, Vol. XII, p. 234.

striking opinion of Mr. Justice Holmes has emphasized the confidence of the Supreme Court in the federal adventure.[24] The pragmatic philosophy of law at which, in the last ten years, Dean Pound has so earnestly labored is, at least in its large outlines, consistent with M. Duguit's conclusions. In a very learned and suggestive work Professor McIlwain [25] has offered a theory of sovereignty full of possibilities to the student of these French ideas; and Mr. Herbert Croly, one of the most penetrating of American observers, has very recently noted the decline and fall of the sovereign state.[26]

But it is above all in the atmosphere of American life that the broad accuracy of M. Duguit's interpretation finds its most striking evidence. The whole background of American constitutionalism is a belief in the supremacy of reason. The very limitation of the much-criticized Fourteenth Amendment only means, as Mr. Justice Holmes has repeatedly emphasized, that legislation must be reasonably conceived and adopt reasonable means of execution; and since that term is a matter of positive evidence it is not a gate but a road. We are coming more and more to bring to the analysis of legal problems whatever facts seem likely to cast light upon their meaning. We are asking the state to justify its existence not so much by the methods it uses as by the value of the results it can obtain. The decline of Congress, for example, is like the similar decline of Parliament and the French Chamber, to be interpreted in the light of its inability to cope with our new demands. We have ceased to look upon historic antiquity as the justification of existence; it is the end of each institution of which we make consistent dissection and inquiry.

In America, perhaps, there has been less speculation than elsewhere as to the new synthesis that is being evolved. It is only in recent years that the problem has become sufficiently acute to merit an urgent examination. Yet it is already obvious that the direction in which the American Commonwealth is traveling gives a new significance to ancient terms; and the political theory of the last generation will need in large part to be rewritten. The kind of background for public law that M. Duguit has drawn serves with great accuracy to describe the changes we have been witnessing. Based, of course, on French experience, it does not at every point fit the orientation of American affairs; yet in its broad perspective it is not inconsistent with the facts at issue. Certainly no student who patiently examined this monumental effort could fail to draw from it at once enlightenment and inspiration.

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[24] Noble State Bank *v.* Haskell, 219 U. S. 104.

[25] *The High Court of Parliament* (1910).

[26] See his very remarkable article, *The Future of the State*, in the *New Republic*, Sept. 15, 1917.